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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/811,527	03/29/2004	Fred Naval Desai	8768MD2	1921

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EXAMINER

HAND, MELANIE JO

ART UNIT	PAPER NUMBER
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3761

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/811,527	Applicant(s) DESAI ET AL.	
	Examiner MELANIE J. HAND	Art Unit 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 April 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,6,9,13,15,16 and 22-36 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2,6,9,13,15,16,22-36 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/16/08</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 16, 2008 has been entered.

Response to Arguments

2. Applicant's arguments filed April 16, 2008 have been fully considered but they are not persuasive.

3. With respect to arguments regarding claim 1: Applicant argues that Odorzynski does not meet the newly added limitation of claim 1 reciting an elastic component selected from the group consisting of an ear and a side panel. This is not persuasive because the elastic component of Odorzynski cited against the claim is the backsheet 12 which defines an ear as seen in Fig. 1. Applicant further argues with respect to amended claim 1 that Odorzynski does not meet the limitation of an elastic composition applied in a pattern wherein the pattern comprises at least two differing elastomeric members that are non-parallel with respect to each other in the elastic component. This is not persuasive because, in Col. 5, lines 40-45, Odorzynski teaches elastomeric members 42 and 44 that are considered herein to be part of an ear of the diaper 10 since there are no structural limitations in claim 1 that define the ear. As can be seen in Fig. 1 these elastomeric members are non-parallel with respect to each other in the ear (elastic component).

4. Applicant's arguments with regard to dependent claims 2, 16, 22, 28 and 29 have been fully considered but are not persuasive, as applicant's arguments depend entirely on arguments regarding the rejection of claim 1, which have been addressed *supra*. It is noted that applicant refers to Himes as focusing on a particular extrudable composition and states that Himes does not remedy the deficiencies of the Odorzynski reference. However, applicant did not argue a deficiency of Odorzynski with respect to a particular elastomeric composition, therefore it is unclear how this argument is intended to overcome the rejection of claim 2.

5. In light of the lack of persuasive arguments, the rejections of currently pending claims 1, 2, 6, 9, 13, 15, 16, and 22-35 are maintained.

Information Disclosure Statement

6. The information disclosure statement (IDS) submitted on April 16, 2008 was filed after the mailing date of the final action on January 16, 2008. The submission is in compliance with the provisions of 37 CFR 1.97. Accordingly, the information disclosure statement is being considered by the examiner.

Claim Rejections - 35 USC § 102

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

8. Claims 1, 6, 9, 13, 15, 17, 23-27 and 30-35 are rejected under 35 U.S.C. 102(b) as being anticipated by Odorzynski et al (U.S. Patent No. 6,245,050).

With respect to **Claim 1**: Odorzynski teaches diaper 10 comprising backsheet 12, topsheet 14 and absorbent core 16. Elastomeric hot melt adhesive is applied to at least any one of the

components of diaper 10, e.g. backsheet 12 defining an ear (Fig. 1), i.e. the elastomeric component. The backsheet 12 is a nonwoven thermoplastic film and the adhesive is an elastomeric hot melt adhesive of substantially identical polymeric origin, the adhesive, activated only by melting, would then cause temporary melting of the backsheet of similar or identical material in the immediate vicinity of the bonding point, and would partially penetrate said substrate. This partial penetration of the substrate constitutes a printing method for applying the elastomeric composition to the substrate, as penetration of a substance onto a substrate is how printing of any substrate is achieved. The elastomeric adhesive composition is applied via slot coating and therefore forms a continuous geometric pattern of rectilinear or curvilinear stripes on the diaper component substrate with a predetermined spacing between stripes. The elastomeric members, i.e. the rectilinear stripes with a predetermined spacing therebetween, are necessarily parallel with respect to each other in the elastic component, i.e. the substrate, as the elastomeric members partially penetrate the substrate and are considered herein to be located in the elastic component substrate. The at least two elastomeric members 42,44 differ in their spacing from adjacent elements, e.g. element 46 (Fig. 1) Thus, the at least two members 42,44 differ in width dimensions between said elastomeric members. Odorzynski teaches elastomeric members 42 and 44 that are considered herein to be part of an ear of the diaper 10 since there are no structural limitations in claim 1 that define the ear. As can be seen in Fig. 1 these elastomeric members 42,44 are non-parallel with respect to each other in the ear (elastic component). (Col. 5, lines 40-45) The elastomeric members 42,44 are formed as discrete film having a width between 0.05 – 3 inches, or between 1.27—76.2 mm, which overlaps and anticipates the claimed range of at least about 2 mm.

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With respect to **claim 6**: The elastomeric adhesive composition taught by Odorzynski is applied via slot coating and therefore forms a continuous geometric pattern of rectilinear or curvilinear stripes on the diaper component substrate with a predetermined spacing between stripes. (Col. 6, lines 13-16)

With respect to **Claim 9**: Odorzynski teaches an elasticized area width of 1.27-7.62 mm and a thickness of 2.54 –25.4 mm, which overlaps and anticipates the claimed range of at least about 0.1 mm. (Col. 6, lines 52-58)

With respect to **Claim 13**: The differing elastomeric members 42,44 taught by Odorzynski are spaced apart. (Fig. 1)

With respect to **Claim 15**: Odorzynski teaches waist elastics 38 and fastening tabs 40 disposed on said elastic ear component that can be made from any one of a group of different suitable elastomeric adhesives, therefore the elastic ear component of diaper 10 comprises at least one additional elastomeric composition disposed on substrate 12. (Col. 6, lines 62-67)

With respect to **Claims 23,24**: Odorzynski teaches that backsheet 12 is comprised of a nonwoven polyethylene web, wherein polyethylene is a polyolefin material. (Col. 2, lines 35-38)

With respect to **Claim 25**: Odorzynski teaches that the component of the diaper containing the adhesive is necked, a process that by its nature comprises incremental stretching. (Col. 6, lines 1-7)

With respect to **Claims 26,27**: Odorzynski teaches an elastic component comprising a second substrate (topsheet) joined to said first substrate (backsheet), via the elastomeric composition acting as adhesive film, to form a laminate, wherein the elastic adhesive composition in film form is disposed between the first substrate and the second substrate. (Col. 5, lines 63-67)

With respect to **claim 30**: The thickness of at least one of the elastomeric areas taught by Odorzynski varies from one part of the member to another. This argument is based upon Odorzynski's teaching that the elastomeric adhesive is applied in the form of a film having a range of thicknesses and that the elasticized areas contract to gather the components to which they are attached, which necessarily causes a variation in thickness. (Col. 6, lines 28-31, 50-58)

With respect to **claim 31**: The thickness of at least one of the elastomeric areas, namely waist area 44, is taught by Odorzynski is considered herein to vary discretely, in areas corresponding to the gathers created. (Col. 1, lines 18,19)

With respect to **claim 32**: Diaper 10 taught by Odorzynski further comprises a plurality of first elastomeric members within area 44 that are parallel to one another that are produced via slot coating to form members 42,44 and a plurality of second elastomeric members within area 42 that are parallel to one another that are produced via slot coating, wherein the plurality of first elastomeric members and the plurality of second elastomeric members are non-parallel with respect to each other. (Fig. 2, Col. 5, lines 40-45)

With respect to **claim 33**: The plurality of first elastomeric members 44 and the plurality of

second elastomeric members 42 taught by Odorzynski differ in differing width dimensions between said first and second elastomeric members 42,44. (Fig. 1)

With respect to **claim 34**: The plurality of first elastomeric members 44 and the plurality of second elastomeric members 42 taught by Odorzynski are perpendicular with respect to each other in certain portions of members 42 located at the transverse centerline of the diaper. (Fig. 1)

With respect to **claim 35**: The plurality of first elastomeric members 44 and the plurality of second elastomeric members 42 are applied in a single step continuous process. (Col. 5, lines 46-67)

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. Claims 28 and 29 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Odorzynski ('050).

With respect to **claim 28**: Odorzynski teaches slot coating as a method of printing any component of diaper 10, e.g. backsheet 12, and therefore does not teach any of the methods set forth in claim 28. However, the limitation of claim 28 contains product-by-process claim language. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process.” *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). See also MPEP § 2113. The burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product. *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir. 1983)

With respect to **claim 29**: Odorzynski teaches an elastomeric hot melt pressure sensitive adhesive, which includes polyurethane adhesives, adhesives set forth in applicant’s disclosure as a material for the claimed adhesive. Thus Odorzynski discloses an elastomeric member having a melt viscosity within the claimed range and an elasticity within the claimed range. When the structure or composition recited in the reference is substantially identical to that of the claims of the instant invention, claimed properties or functions presumed to be inherent (MPEP 2112-2112.01). A prima facie case of either anticipation or obviousness has been established when the reference discloses all the limitations of a claim (in this case, an absorbent article having an elastomeric member) except for a property or function (in the present case, the melt viscosity of the elastomeric member) and the examiner can not determine whether or not the reference inherently possesses properties that anticipate or render obvious the claimed invention but has a basis for shifting the burden of proof to applicant, as per *In re Fitzgerald*, 619

F.2d 67, 205 USPQ 594 (CCPA 1980). Alternatively, it would be obvious to one of ordinary skill in the art to modify the article of Odorzynski such that the elastomeric member has a melt viscosity and elasticity in the claimed range with a reasonable expectation of success to impart desired elastic properties to the article to allow a more comfortable fit for the user.

11. Claims 16, 18-22 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Odorzynski ('050).

With respect to **Claim 16**: Odorzynski teaches selecting the viscosity of the adhesives that can involve mixing adhesives as well as heating them. Odorzynski does not explicitly teach two different adhesives, however Odorzynski does teach applying the adhesives either by spray coating or film forming (Col. 6, lines 13-20) which would allow the application of different elastic adhesive compositions to one substrate. Examiner asserts therefore that it would be obvious to modify the adhesive area taught by Odorzynski so as to be comprised of two different adhesive compositions applied in two different patterns.

With respect to **Claims 18,19,20,22**: Odorzynski does not explicitly teach different elastic adhesives disposed on different components of diaper 10. However, since Odorzynski teaches various application methods for the elastic adhesive composition, various suitable materials for the composition itself, and teaches applying an adhesive to at least one component of diaper 10 (e.g. fastening tabs 40 to topsheet 14), it would be obvious to one of ordinary skill in the art to apply different adhesives in different patterns to different components of diaper 10, said differing adhesives exhibiting different elastic properties.

With respect to **Claim 21**: Fastening tabs 40 taught by Odorzynski comprising an elastic adhesive form a right angle in area 46 with topsheet 14 containing an elastic adhesive. (Fig. 1)

With respect to **claim 36**: Odorzynski teaches an absorbent article 10 comprising a waist member 38, said waist member 38 comprising a first substrate in the form of backsheet 12 having an elastomeric composition applied directly via a printing method. Examiner's position regarding whether the method of application of the elastomeric composition is based upon the fact that the backsheet 12 is a nonwoven thermoplastic film and the adhesive is an elastomeric hot melt adhesive of substantially identical polymeric origin. The adhesive, activated only by melting, would then cause temporary melting of the backsheet of similar or identical material in the immediate vicinity of the bonding point, and would partially penetrate said substrate. This partial penetration of the substrate constitutes a printing method for applying the elastomeric composition to the substrate, as penetration of a substance onto a substrate is how printing of any substrate is achieved. The adhesive is applied via slot coating and therefore forms a continuous geometric pattern of rectilinear or curvilinear stripes on the diaper component substrate with a predetermined spacing between stripes. Since Odorzynski teaches slot coating, the at least two elements differ in their spacing from adjacent elements; the spacing between adjacent elements in the machine direction is less than the spacing between adjacent elements in the cross direction. Thus the at least two members differ in width dimensions between said elastomeric members. Elastomeric hot melt adhesive is applied to at least any one of the components of diaper 10, e.g. backsheet 12. The adhesive is applied via slot coating and therefore forms a continuous geometric pattern of rectilinear or curvilinear stripes on the diaper component substrate with a predetermined spacing between stripes. The backsheet 12 is a nonwoven thermoplastic film and the adhesive is an elastomeric hot melt adhesive of

substantially identical polymeric origin, the adhesive, activated only by melting, would then cause temporary melting of the backsheet of similar or identical material in the immediate vicinity of the bonding point, and would partially penetrate said substrate. This partial penetration of the substrate constitutes a printing method for applying the elastomeric composition to the substrate, as penetration of a substance onto a substrate is how printing of any substrate is achieved. The elastomeric members, i.e. the rectilinear stripes with a predetermined spacing therebetween, are necessarily parallel with respect to each other in the elastic component, i.e. the substrate, as the elastomeric members partially penetrate the substrate and are considered herein to be located in the elastic component substrate.

Odorzynski teaches elastomeric members 42 and 44 that are considered herein to be part of an ear of the diaper 10 since there are no structural limitations in claim 1 that define the ear. As can be seen in Fig. 1 these elastomeric members are non-parallel with respect to each other in the ear (elastic component). (Col. 5, lines 40-45) The elastomeric members 42,44 are formed as discrete film having a width between 0.05 – 3 inches, or between 1.27—76.2 mm, which overlaps and anticipates the claimed range of at least about 2 mm.

Odorzynski teaches that the two elastomeric members in at least two differing individual elastomeric members are non-parallel with respect to each other in said waist member. However, since Odorzynski teaches that the elastomeric composition can be applied by spray coating, which is fully capable of producing non-parallel elastomeric members within the waist member, it would be obvious to one of ordinary skill in the art to modify the article of Odorzynski such that the at least two elastomeric members are non-parallel with respect to each other in the waist member with a reasonable expectation of success to ensure that the elastomeric composition is properly applied and suitable for use in the article.

12. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Odorzynski ('050) in view of Himes (U.S. Patent No. 5,304,599).

With respect to **Claim 2**: Odorzynski does not teach a percent set for the elastomeric adhesive. Himes teaches an extrudable elastomeric composition including an elastomeric polymer and a tackifying resin having a percent set of 9%, which falls within the claimed range. ('599, Table 4). Himes teaches that this composition is suitable for extrusion onto an elastic sheet, therefore it would be obvious to substitute the composition taught by Himes for the adhesive composition as taught by Odorzynski so as to have a backsheet with the adhesive composition therein having a percent set of 9% as taught by Himes with a reasonable expectation of success.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELANIE J. HAND whose telephone number is (571)272-6464. The examiner can normally be reached on Mon-Thurs 8:00-5:30, alternate Fridays 8:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Melanie J Hand/
Examiner, Art Unit 3761